Supreme Court, U.S.
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In The

Supreme Court of the United States

THE STATE OF OKLAHOMA,

Petitioner,

vs.

RYAN GOLDEN, DARRELL W. HOGAN, and FRANKLIN LEE GIBBS, JR.,

Respondents.

On Petition For Writ Of Certiorari To The Oklahoma Court Of Criminal Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Is the erroneous denial of the full complement of peremptory challenges granted to a defendant by state statute a structural error which requires an automatic reversal for a new trial without regard to whether the error prejudiced the defendant?

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

Petitioner respectfully requests this Court to grant a petition for writ of certiorari to review the Opinions of the Oklahoma Court of Criminal Appeals entered January 10, 2006, February 10, 2006, and March 9, 2006. *See Golden v. State*, 127 P.3d 1150 (Okla. Crim. App. 2006); *Hogan v. State*, Case No. F-2004-1266 (Okla. Crim. App. 2006) (unpublished); *Gibbs v. State*, Case No. F-2004-649 (Okla. Crim. App. 2006) (unpublished).

STATEMENT OF JURISDICTION

The opinions of the Oklahoma Court of Criminal Appeals (OCCA), *Golden v. State*, 127 P.3d 1150 (Okla. Crim. App. 2006), *Hogan v. State*, Case No. F-2004-1266 (Okla. Crim. App. 2006) (unpublished), and *Gibbs v. State*, Case No. F-2004-649 (Okla. Crim. App. 2006) (unpublished), from which the instant petition is presented were rendered on January 10, 2006, February 10, 2006, and March 9, 2006, respectively. Petitioner filed a petition for rehearing with the OCCA in *Golden* on January 25, 2006, and said petition was denied by the OCCA on March 9, 2006. Petitioner also filed a petition for rehearing in *Hogan*. Said petition was filed on March 2, 2006, and denied by the OCCA on March 22, 2006. Due to the denials in *Golden* and *Hogan*, no petition for rehearing was filed in *Gibbs*. Motions to recall mandate were filed in each case: in *Golden* on March 15, 2006, and in *Hogan* and *Gibbs* on March 27, 2006. Such motions were denied on April 5, 2006, in Respondents Golden and Gibbs' cases and on April 19, 2006, in Respondent Hogan's case. This Court

is authorized to review the OCCA's decisions in these cases by 28 U.S.C. § 2104. *See also* 28 U.S.C. §§ 2101(d), 2102. These cases are combined in this single petition pursuant to Rule 12.4, *Rules of the Supreme Court.*

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. "No person shall . . . be deprived of life, liberty, or property, without due process of law[.]" Fifth Amendment, United States Constitution.

2. "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." Fourteenth Amendment, United States Constitution.

3. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed[.]" Sixth Amendment, United States Constitution.

4. "In all criminal cases the prosecution and the defendant are each entitled to the following peremptory challenges: . . . First. In prosecutions for first degree murder, nine jurors each. . . ." Okla. Stat. tit. 22, § 655 (2001).

STATEMENT OF THE CASES

Respondent Golden is currently incarcerated pursuant to a Judgment and Sentence rendered in the District

Court of Pottawatomie County, Oklahoma, Case No. CF-2003-199. Respondent Golden was tried by a jury for the crime of first degree malice aforethought murder for shooting Phillip Hutchinson after an argument on a sidewalk in Shawnee, Oklahoma. At the conclusion of the trial, the jury found Respondent Golden guilty as charged and recommended a sentence of life imprisonment without the possibility of parole. Respondent Golden was sentenced accordingly.

In a published opinion filed on January 10, 2006, the OCCA reversed Respondent Golden's conviction and sentence and remanded the case for a new trial. *Golden*, 127 P.3d 1150. In its opinion, the OCCA found "[d]eprivation of the right to exercise nine peremptory challenges, which was statutorily due under Oklahoma law, constitutes a due process violation." *Id.*, 127 P.3d at 1153. Then, relying on this Court's discussion of structural errors in *Arizona v. Fulminante*, 499 U.S. 279 (1991), the OCCA found the erroneous denial of the full complement of peremptory challenges to which a defendant is entitled under state law constituted a structural error which required automatic reversal, regardless of prejudice or a lack thereof. *Golden*, 127 P.3d at 1153-55. Rehearing was denied by the OCCA on March 9, 2006.

Respondent Hogan is currently incarcerated pursuant to a Judgment and Sentence rendered in the District Court of Pittsburg County, Oklahoma, Case No. CF-2004-300. Respondent Hogan was tried by a jury for the crime of first degree murder for killing his cellmate while both were incarcerated in the Oklahoma State Penitentiary at McAlester, Oklahoma. At the conclusion of the trial, the jury found Respondent Hogan guilty as charged and recommended a sentence of life imprisonment without the

possibility of parole. The trial court sentenced Respondent Hogan accordingly.

In an unpublished opinion filed February 10, 2006, the OCCA, relying on its opinion in *Golden*, reversed and remanded Respondent Hogan's case for a new trial. *Hogan*, F-2004-1266. Rehearing was denied by the OCCA on March 22, 2006.

Respondent Gibbs is currently incarcerated pursuant to a Judgment and Sentence rendered in the District Court of Pittsburg County, Oklahoma, Case No. CF-2004-29. Respondent Gibbs was tried by a jury for the crimes of first degree murder and possession of a firearm after former conviction of two or more felonies stemming from the shooting death of Kia Tasby. The jury in Respondent Gibbs' case found him guilty as charged on both counts and recommended sentences of life imprisonment without the possibility of parole for the murder count and fifty (50) years imprisonment for the firearm count. Subsequently, the trial court sentenced Respondent Gibbs in accordance with the jury's recommendations.

In an unpublished opinion filed March 9, 2006, the OCCA reversed and remanded Respondent Gibbs' case for a new trial. The OCCA's decision was based on its holding in *Golden*. *Gibbs*, F-2004-649. Rehearing was not sought in Respondent Gibbs' case.

STATEMENT OF FACTS

In Respondent Golden's case, the trial court announced before voir dire began that each side would be granted five peremptory challenges (Golden Trial Tr. I 18).

Apparently this announcement was based on a mistaken belief that non-capital first degree murder trials are "other felonies" for purposes of Okla. Stat. tit. 22, § 655 (2001), which provides nine peremptory challenges to each side for "prosecutions for first degree murder" but only five such challenges in all other felonies. Despite the trial court's error, Respondent Golden did not object to the trial court's announcement, ask that he be given the correct statutory number of challenges, or argue that he needed additional peremptory challenges for any reason (*see e.g.* Golden Trial Tr. I 18-19, 129-42). The prosecutor did not alert the trial court to this error, either (Golden Trial Tr. I 18-19).

Similar circumstances occurred in both Respondent Hogan's and Respondent Gibbs' cases. In each case, neither Respondent Hogan nor Respondent Gibbs objected to the trial court's erroneous grant of only five peremptory challenges nor did they otherwise request the full complement of nine peremptory challenges to which they were entitled under Oklahoma law (Hogan Trial Tr. I 19, 108-12; Gibbs Trial Tr. I 8, 84-85). Additionally, the prosecutors in the Hogan and Gibbs cases did not inform the respective trial courts of the error (Hogan Trial Tr. I 19, 108-12; Gibbs Trial Tr. I 8, 84-85).

Because the respondents did not object at trial to the number of peremptory challenges they received, the first time the issue was raised in any of their cases was on direct appeal to the OCCA. Although the OCCA has long held that failure to object to an error at trial waives review on appeal for all but plain error, the state court found the trial courts' erroneous denials of the full complement of peremptory challenges in the respondents' cases were not only plain errors, but that they, in fact, constituted structural errors, and therefore reversed the respondents'

convictions and sentences and remanded their cases for new trials. *Golden*, 127 P.3d at 1155; *Hogan*, F-2004-1266; *Gibbs*, F-2004-649.

REASONS FOR GRANTING THE WRIT

The OCCA's decisions in these cases, in which it found the errors to be structural errors, constitutes a "compelling reason[]" for this Court to grant review. *See* Rule 10, *Rules of the Supreme Court.* This is because in expanding the number of errors found to be "structural," the OCCA "decided an important federal question in a way that conflicts with relevant decisions of this Court." Rule 10, *Rules of the Supreme Court.* For instance, this Court has "found structural errors only in a very limited class of cases[,]" none of which includes a court's failure to provide a defendant with the full complement of statutorily-dictated peremptory challenges to which he is entitled. *See Johnson v. U.S.*, 520 U.S. 461, 468-69 (1997). Additionally, this Court has signaled that it would likely disagree with the OCCA's identification of the error in this case as structural. In *U.S. v. Martinez-Salazar*, 528 U.S. 304, 317 fn. 4 (2000), this Court suggested that a rule of "automatic reversal whenever a defendant's right to a certain number of peremptory challenges is substantially impaired[,]" makes little sense in light of this Court's adoption of harmless error review. Therefore, Petitioner respectfully urges this Court to grant certiorari review of the OCCA's decision in this case.

THE OCCA'S DETERMINATION THAT THE DENIAL OF A FULL COMPLEMENT OF STATUTORILY-MANDATED PEREMPTORY CHALLENGES IS A STRUCTURAL ERROR WHICH IS NOT SUBJECT TO HARMLESS ERROR ANALYSIS IS AN UNREASONABLE EXTENSION OF THIS COURT'S STRUCTURAL ERROR JURISPRUDENCE.

Although the respondents in this case were erroneously denied four of the peremptory challenges to which they were entitled by statute, they nevertheless received fundamentally fair trials before impartial juries. Because a structural error cannot occur where the complained-of defect did not affect the entire framework within which a defendant's trial took place, the error in these cases cannot be said to have been structural. Therefore, as the OCCA's determination that the error in these cases was structural is unreasonable and contrary to this Court's prior findings of structural error, Petitioner respectfully requests this Court grant certiorari to review the state court's decisions.

Structural errors are those errors which deprive a defendant of "basic protections" without which "a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair." *Fulminante*, 499 U.S. at 310 (internal citation omitted). Another way of describing structural errors is as "defect[s] affecting the framework within which the trial proceeds, rather than simply [] error[s] in the process itself." *Id.* Conversely, when an error "does not *necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence[,]" it is not